by Freidin and Hamric revealed that Ms. Weil had employed these same business practices while in the employment of her prior employer First American Title Insurance Company. The documents further revealed that First American Title Insurance Company and their attorney were aware of Ms. Weil's business practices.

At some point after Freidin's discovery of documents evidencing the above; the exculpatory documents began to disappear from the discovery documents made available to Freidin and Hamric for review, but had been restricted NOT to copy. Hence, Mr. Freidin's first hand knowledge of the existence of exculpatory documents disappearing while in the custody of the government and additional information not contained in Mr. Freidin's filed Affidavits was not replaceable by Hamric without Mr. Freidin's participation or the filing of existing additional affidavits.

In his endeavor to defend Hamric, Mr. Freidin, on October 24, 1996, executed an Affidavit setting forth evidence of Government misconduct. Another Affidavit, by Mr. Freidin, was executed March 3, 1997. This Affidavit also alleged Government misconduct. Another Affidavit was executed, by Mr. Freidin, on March 5, 1997, also alleging Government misconduct. Thus, on March 5, 1997, Mr. Lida filed a motion to dismiss the indictment based on government misconduct with a couple of Mr. Freidin's Affidavits of alleged government misconduct attached. That was the end of Mr. Freidin's aggressiveness concerning Hamric's trial defense.

Three months later, Mr. Freidin was actually indicted by the same U.S. Attorney's Office prosecuting Hamric. Therefore, when a hearing was held in Hamric's case on July 29, 1997, Mr. Freidin did not appear to aid Hamric with his allegations of government misconduct and further Hamric's defense. Although, Mr. Lida had assured Hamric on several occasions that Mr. Freidin would attend and participate in the hearing. Please note that Mr. Freidin remained Attorney of Record for Hamric at the time of this hearing. On page ten (10) of the Order issued on November 16, 2004, the District Court incorrectly stated that Freidin had withdrawn on July 18, 1997 as Hamric's defense attorney prior to this hearing. See APPENDIX (A).

The July 29, 1997 hearing was in essence continued and the Court ordered Affidavits be submitted by the government and invited the defense to file additional Affidavits to bolster their claims. The government filed several Affidavits, but none were submitted by the defense, because at this point, a conflict of interest had developed concerning Mr. Freidin, Mr. Carl Lida and Hamric.

To illustrate the actual conflict of interest that adversely affected Hamric's counsels' performance; following Mr. Freidin's indictment, Mr. Freidin retained his personal friend and quasi business law partner, Mr. Carl Lida as his personal criminal defense attorney. What makes this action so important, is although Mr. Lida was Hamric's attorney at the time, Mr. Lida agreed to represent Mr. Freidin who was also Hamric's Defense Attorney and central witness to support Hamric's allegations of government misconduct.

Mr. Lida actually filed a Notice of Appearance (DE-20, No. 8:97-Cr-216) in Mr. Freidin's criminal case. Mr. Lida's continued and ongoing advice to Mr. Freidin was for Freidin not to assist Hamric in any way. This included pretrial or trial testimony, nor were he to provide any additional Affidavits that would support Hamric's defense. Hence, when the trial court invited Hamric to file additional Affidavits to further substantiate his allegations of government misconduct and prejudice, Hamric was unable to secure additional Affidavits from Freidin as a result of Mr. Lida's advice to Mr. Freidin which was adverse to Hamric. The bell could not be unrung. Further, Mr. Lida chose not to file Affidavits with the court that he possessed that would have further substantiated Hamric's claims of government misconduct and resulting prejudice.

After Mr. Lida withdrew from Mr. Freidin's case, he continued to meet and speak with Mr. Freidin and his replacement attorneys and give advice adverse to Hamric's interests. Although on the record Mr. Lida wanted to appear to be representing Hamric's interests; he simply was not and did not. Mr. Lida was fully aware that Mr. Freidin was adhering to Lida's continued advice and would not provide additional Affidavits nor testimony, which Hamric needed to advance his defense.

The loss of the availability of Mr. Freidin's pretrial and trial testimony as a result of Mr. Lida's advice to Mr. Freidin, their choice not to file with the Court existing Affidavits that further supported Hamric's defense, and Lida's refusal to interview witnesses that Mr. Freidin had previously interviewed which supported Hamric's defense, all of which influenced Hamric's decision to enter the coerced and unknowing plea agreement engineered by Mr. Lida.

Mr. Lida was fully aware that Hamric entered the plea agreement on January 23, 1998 with the understanding that he would be able to appeal the District Court's pretrial rulings. By phone, Mr. Lida advised Hamric to go alone to the U.S. Attorney's office in Tampa, Florida to execute the plea agreement, which Hamric did on January 23, 1998. Mr. Lida had advised Hamric that he was only waiving his right to appeal a "guideline sentence" by executing the plea agreement. Then, on January 28, 1998, five (5) days later, Mr. Lida appeared in court and executed the Plea Agreement and stood silently (relating to waiver of pretrial rulings) as Hamric's plea colloquy was completed.

Mr. Lida did so knowing Hamric's understanding of entering the Plea Agreement and pleading guilty would not affect Hamric's rights to appeal the District Court's pretrial rulings and orders. Again, Mr. Lida did not execute the Plea Agreement on January 23, 1998 as the agreement suggests and was detailed in the District Court Order dated November 16, 2004. See APPENDIX (A). Mr. Lida was not in Tampa, Florida on January 23, 1998 and most certainly was not present at the U.S. Attorney's Office with Hamric when Hamric unknowingly began the process of waiving his rights to appeal pretrial rulings and orders by executing the agreement in the presence of James A. Muench, Assistant United States Attorney.

In summary, Mr. Lida represented and continued to give adverse advice to a central figure in Hamric's case. Mr. Lida chose not to file additional affidavits that he possessed when invited to file them by the District Court and refused to interview witnesses and prepare for Hamric's pending trial due to the actual conflict of interest that occurred between Mr. Lida, Mr. Freidin and Hamric. Mr. Lida and Mr. Freidin

made negative choices in Hamric's defense as a result of the actual conflict of interest. Further, Mr. Lida knowingly allowed Hamric to unknowingly and unvoluntarily waive his right to appeal pretrial rulings and orders.

Thus, Hamric has pointed to specific instances (in the record) to (suggest) an actual conflict or impairment of his interest and has shown that Mr. Freidin and Mr. Lida made a choice between possible alternative courses of action.

CONCLUSION

This Court should grant the request for Writ of Certiorari and remand to the Court of Appeals for the Eleventh Circuit to enter an order consisting to its decision.
Mailed this 31st day of August of 2005.

Respectfully submitted,

Richard P. Hamric, Pro Se
2720 Hope Street
Sarasota, Florida 34231
941/504-0229

RICHARD P. HAMRIC'S PETITION
FOR
WRIT OF CERTIORARI

Appendix (A)
District Court's Order
November 16, 2004

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

RICHARD P. HAMRIC
Petitioner,

vs.

Case No. 2:95-cr-113-FtM-29DNF
Case No. 2:03-cv-295-FtM-29DNF

UNITED STATES OF AMERICA,
Respondent.

OPINION AND ORDER

This matter comes before the Court on a Motion Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Cv. Doc. #1[1]), filed on June 23, 2003. The United States filed its Response in Opposition (Cv. Doc. #18) on October 29, 2003. Petitioner, with the permission of the Court (Cv. Doc. #20), filed a Reply (Cv. Doc. #22) on February 4, 2004.

I.

On December 6, 1995, petitioner Richard P. Hamric (petitioner or Hamric) was named in a twenty-count Indictment (Cr. Doc. #1) charging him with five counts of mail fraud, five counts of bank fraud, and ten counts of money laundering. After extensive pretrial proceedings, on January 28, 1998, petitioner entered a guilty plea to one mail fraud count and one money laundering count(Cr. Doc. #215) pursuant to a Plea Agreement (Cr. Doc. #213). On May 22, 1998, petitioner was sentenced to 87 months imprisonment, 36 months supervised release, and a $100 special assessment. Cr. Docs. #231, 232). Petitioner filed

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[1] Unless otherwise specified, docket numbers referring to the criminal case are cited as (Cr. Doc.) and docket numbers referring to the civil case are cited as (Cv. Doc.).

a direct appeal (Cr. Docs.#233, 234), and his conviction and sentence were affirmed by the Eleventh Circuit Court of Appeals on May 30, 2002. (Cr. Doc. #286). Petitioner's timely § 2255 motion is now before the court.

Petitioner raises the following six claims in his § 2255 motion: (1) he received constitutionally ineffective assistance of counsel because his trial attorneys had actual conflicts of interest; (2) his appellate attorney provided ineffective assistance of counsel when she failed to raise the conflict of interest claim on direct appeal; (3) he received constitutionally ineffective assistance of counsel because his trial attorney failed to adequately investigate and prepare for trial; (4) his appellate attorney provided ineffective assistance of counsel when she failed to raise the issue of his trial attorney's failure to investigate and prepare; (5) his guilty plea was the result of coercion and a lack of knowledge concerning his legal inability to appeal pretrial rulings; and (6) his appellate attorney provided ineffective assistance of counsel when she failed to raise the claim of an involuntary guilty plea on direct appeal.

II.

A.

Issues of ineffective assistance of counsel can be raised in a § 2255 proceeding even where petitioner could have raised the issues on direct appeal but failed to do so. Massaro v. United States, 538 U.S. 500 (2003). The Supreme Court established a two-part test for determining whether a convicted person is entitled to habeas relief on the ground that his or her counsel rendered ineffective assistance: (1) whether counsel's representation was deficient, i.e., "fell below an objective standard of reasonableness"; and (2) whether the deficient performance prejudiced the defendant, i.e., there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668, 687-88 (1984). See also Wiggins v. Smith, 539 U.S. 510 (2003); Williams v. Taylor, 529 U.S. 362 (2000). A court must "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's

conduct." Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000) (quoting Strickland, 466 U.S. at 690). This judicial scrutiny is "highly deferential." Id. A court must adhere to a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Strickland, 466 U.S. at 689-90. An attorney is not ineffective for failing to raise a meritless issue. United States v. Winfield, 960 F.2d 970, 974 (11th Cir. 1992). In light of the general principles and presumptions applicable to ineffective assistance of counsel claims, the cases in which habeas petitioners can prevail are few and far between. Chandler v. United States, 218 F.3d 1305, 1313-14 (11th Cir. 2000) (en bane), cert. denied, 531 U.S. 1204 (2001).

The same deficient performance and prejudice standards apply to appellate counsel. Smith v. Robbins, 528 U.S. 259, 285-86 (2000); Roe v. Flores-Ortega, 528 U.S. at 476-77. If the Court finds there has been deficient performance, it must examine the merits of the claim omitted on appeal. If the omitted claim would have had a reasonable probability of success on appeal, then the deficient performance resulted in prejudice. Joiner v. United States, 103 F.3d 961, 963 (11th Cir. 1997).

B.

"A guilty plea is more than a confession which admits that the accused did various acts. It is an admission that he committed the crime charged against him. By entering a plea of guilty, the accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime." United States v. Broce, 488 U.S. 563, 570 (1989)(quotations and citations omitted). For this reason, the United States Constitution requires that a guilty plea must be voluntary and defendant must make the related waivers knowingly, intelligently and with sufficient awareness of the relevant circumstances and likely consequences. United States v. Ruiz, 536 U.S. 622, 629 (2002); Hill v. Lockhart, 474 U.S. 52, 56 (1985); Henderson v. Morgan, 426 U.S. 637, 645 n.13 (1976). An unconditional guilty plea which is made knowingly, voluntarily, and with

the benefit of competent counsel waives all non-jurisdictional defects in the court proceedings (with some exceptions not relevant to this case). United States v. Patti, 337 F.3d 1317, 1320 (11th Cir. 2003), cert. denied, 124 S.Ct. 1146 (2004); United States v. Pierre, 120 F.3d 1153, 1155 (11th Cir. 1997). This includes rulings on pretrial motions to suppress. United States v. McCoy, 477 F.2d 550, 551 (5th Cir. 1973)[2], and rulings based on prosecutorial misconduct. United States v. Fairchild, 803 F.2d 1121, 1124 (11th Cir. 1986). Therefore, after a criminal defendant has plead guilty, he may not raise claims relating to the alleged deprivation of constitutional rights occurring prior to the entry of the guilty plea, but may only attack the voluntary and knowing character of the guilty plea, Tollett v. Henderson, 411 U.S. 258, 267 (1973); Wilson v. United States, 962 F.2d 996, 997 (11th Cir. 1992), or the constitutional effectiveness of the assistance he received from his attorney in deciding to plead guilty. Fairchild, 803 F.2d at 1123.

III.

The chronology of petitioner's representation by various counsel is fairly extensive, but a review is necessary to place several of the issues in context.

Petitioner was indicted on December 6, 1995. (Cr. Doc. #1). At his initial appearance on December 7, 1995, petitioner was represented by attorney Jim Felman (Felman), who stated he had represented petitioner since December, 1991, in connection with the matter. Felman made a limited appearance for purposes of the initial appearance pending completion of fee arrangements with petitioner. (Cr. Doc. #123, p. 3) . Felman also appeared with petitioner at the December 27, 1995 arraignment, but advised that financial arrangements still had not been made with petitioner. (Cr. Doc. #18, pp. 2-3). Petitioner testified briefly as to his financial status (Cr. Doc. #18, pp. 7-10), and the magistrate judge found him to eligible for court appointed counsel

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[2]In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc) the Eleventh Circuit adopted as binding precedent all the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

with the condition that he reimburse the government. (Cr. Doc. #18, p. 10). The arraignment was re-scheduled, and the magistrate judge stated that if Felman did not file a notice of appearance the Federal Public Defender (FPD) would be appointed. (Cr. Doc. #18, pp. 10-11). At a January 5, 1996, status conference before the district judge, Felman reported he still had not been retained. The district judge referred the matter to the magistrate judge. (Cr. Doc. #128). Petitioner gave further sworn testimony regarding his financial status before the magistrate judge, who found petitioner did not qualify for court appointed counsel and appointed the FPD only for the arraignment. (Doc. #19, pp. 7-10). The magistrate judge instructed petitioner to make immediate arrangements to hire his own attorney. (Cr. Doc. #19, pp. 9-10).

At a status conference on January 12, 1996, petitioner appeared without counsel and advised he had not retained counsel; the status conference was continued for a week. (Cr. Docs. #21; 124). At a January 19, 1996, status conference, petitioner again advised the court he had not retained counsel. The district judge advised petitioner of his constitutional right to represent himself, but petitioner stated he wished to be represented by counsel. (Cr. Docs. #112, p. 3).

At a January 26, 1996, status conference before the district judge, petitioner stated that he had no funds to hire an attorney. The district judge referred the matter to the magistrate judge. (Cr. Doc. #129). Petitioner told the magistrate judge that he expected money from family and friends within the week; the magistrate judge re-scheduled the discovery hearing and a status hearing, and advised petitioner that if he appeared without counsel he should be prepared to give extensive testimony regarding his financial status. (Cr. Docs. #27, 28).

At a January 29, 1996 status hearing before the district judge, petitioner said he had no money but was trying to hire an attorney. The district judge admonished petitioner for telling him he had no money but telling the magistrate judge he had funds for counsel. (Cr. Doc. #130).

On February 2, 1996, petitioner advised the magistrate

judge that he was in a position to retain Felman, but Felman was out of town. The magistrate judge appointed the FPD for all proceedings, with the condition that petitioner reimburse the government monthly for the expenses of representation. The magistrate judge provided that Felman may substitute in as counsel if retained. (Cr. Docs. #122, pp. 2-7; #32). The FPD entered a Notice of Appearance (Cr. Doc. #33) on February 15, 1996, and appeared with petitioner at a February 15, 1996, status conference with the district judge. (Cr. Doc. #121). At a March 8, 1996 status conference, defense counsel was granted a continuance until the November, 1996 trial term.(Cr. Doc. #131).

Petitioner retained attorney Howard Freidin (Freidin) to represent him, and Freidin entered a Notice of Appearance (Cr. Doc. #38) on March 26, 1996. The magistrate judge granted the FPD's Motion to Withdraw as Attorney of Record (Cr. Doc. #41) on March 29, 1996.

On June 11, 1996, Freidin filed a Motion to Withdraw (Cr. Doc. #43), asserting that "irreconcilable differences" had arisen between himself and petitioner. A hearing was held before the magistrate judge on July 15, 1996, and Freidin advised that he had not been paid and wanted to withdraw. The magistrate judge granted the motion to withdraw, and discussed whether the FPD had a conflict of interest which prevented re-appointment. Concluding there was no such conflict, the magistrate judge re-appointed the FPD, conditioned upon petitioner's reimbursement of the government. Cr. Docs. #279, pp. 7-14; #50; #51).

On August 7, 1996, Freidin re-entered the case, filing a Stipulated Substitution of Counsel (Cr. Doc. #55) and replacing the Federal Public Defender's Office. The magistrate judge allowed the substitution of counsel. (Cr. Doc. #56).

Petitioner asserts that in September, 1996, Freidin became the subject of a criminal investigation by the same U.S. Attorney's Office which was prosecuting petitioner. (Cv. Doc. #1, p. 8). While petitioner asserts that this was unknown to him at the time, he retained attorney Carl Lida (Lida), and Lida filed a Permanent Notice of Appearance As Lead Counsel (Cr. Doc. #60) on September 20, 1996.

On June 5, 1997, Freidin was indicted in the Tampa Division of the Middle District of Florida on criminal charges completely unrelated to petitioner. (Case No. 8:97-Cr-216). On June 16, 1997, Lida filed a Notice of Appearance on behalf of Freidin in Freidin's criminal case. (Case No. 8: 97-Cr-216, Cr. Doc. #20). On July 7, 1997, attorney James Hogan filed a motion to substitute as counsel for Freidin in place of Lida (Case No. 8:97-Cr-216, Cr. Doc. #34), and was added as counsel for Freidin on July 8, 1997. On July 18, 1997, an Order (Case No. 8:97-Cr-216, Cr. Doc. #49) was entered granting the substitution and terminating Lida's responsibility in the case. Lida had no further involvement in the Freidin case. Petitioner asserts Lida's representation of Freidin was not known to him. (Cv. Doc. #1, p. 8).

On July 31, 1997, Freidin filed a Motion to Withdraw (Cr. Doc. #173) as petitioner's attorney because of his Tampa indictment. A copy of the motion was sent to petitioner. (Cr. Doc. #173). This motion was granted on August 1, 1997 (Cr. Doc. #176), and Lida continued to represent petitioner as lead counsel.

On January 23, 1998, a Plea Agreement (Cr. Doc. #213) was filed, and on January 28, 1998, petitioner plead guilty (Cr. Doc. #215). Petitioner was sentenced on May 22, 1998, (Cr. Doc. #231), and a Notice of Appeal (Cr. Docs. #233, 234) was filed on June 1, 1998).

On June 12, 1998, Lida filed a Motion to Withdraw as Attorney of Record for Appellate Purposes (Cr. Doc. #236) because he had not been retained by petitioner for the appeal and petitioner was currently without funds to retain him for that purpose. On July 9, 1998, the magistrate judge conducted a hearing, at which petitioner participated by telephone. (Cr. Doc. #253) . The magistrate judge granted the motion and relieved Lida of further responsibility regarding the appeal, entering an Order on July 15, 1998. (Cr. Doc. #245).

In a December 3, 1999 Order (Cr. Doc. #249), the Eleventh Circuit Court of Appeals remanded the case to the district court to conduct an *in camera* evidentiary hearing as to whether petitioner wished to represent himself on appeal. This was necessitated because petitioner initially requested that the FPD be appointed to represent him on appeal and

then stated he did not want appointed counsel on appeal.

Petitioner participated in the *in camera* hearing by telephone (Cr. Doc. #255) on January 6, 2000. Petitioner stated he was not prepared to proceed, and wanted additional time to contact family members and private attorneys regarding representation on appeal. The district court therefore continued the hearing. (Cr. Doc. #255). A second telephone conference was held on January 14, 2000, and petitioner advised that he wanted appointed counsel for appeal. (Cr. Doc. #258, p. 2).

On January 18, 2000, petitioner filed a Motion to Have Appointment of Special and Specific Counsel (Cr. Doc. #256). In this motion petitioner asked the court to appoint attorney Marcia G. Shein (Shein) to represent him on direct appeal. Petitioner stated, among other things, that he had "developed a trust" with Shein, who "has demonstrated an exceptional understanding and grasp of the issues at hand." (Cr. Doc. #256, p. 4).

In a January 20, 2000 Order (Cr. Doc. #258), the district court found petitioner was indigent and wanted appointed counsel, and that Shein had agreed to accept the appointment and the fees provided under the Criminal Justice Act. The district court appointed Shein to represent petitioner on appeal. Shein subsequently filed a Motion to Withdraw with the Eleventh Circuit, which the Eleventh Circuit denied in an Order (Cr. Doc. #276) filed May 14, 2001.

IV.

Petitioner argues that he was denied his Sixth Amendment right to the effective assistance of counsel because his district court attorneys had actual conflicts of interest and the trial court erred in failing to inform him of his right to conflict-free counsel. Petitioner asserts that Freidin was indicted while representing petitioner, and Lida was the first attorney to file a notice of appearance on behalf of Freidin; that Lida advised Freidin not to testify or file additional affidavits on petitioner's behalf in connection with a pending motion to dismiss, even though the trial court had ordered additional affidavits be filed; and that no one informed petitioner of the possible conflict of interest and his right to seek conflict-free

counsel. (Cv. Doc. #22, p. 3). In his Reply, petitioner argues that the most important argument is that he was not advised of the possible conflict of interest and given an opportunity to obtain conflict-free counsel. (Cv. Doc. #22, pp. 3, 5).

A.

The Sixth Amendment to the United States Constitution guarantees criminal defendants the right to effective assistance of counsel, and effective assistance includes a right to counsel "unimpaired by conflicting loyalties." Duncan v. Alabama, 881 F.2d 1013, 1016 (11th Cir. 1989). Indeed, the "duty of unfettered loyalty to one's clients is among the most central of a criminal defense attorney's responsibilities." Reynolds v. Chapman, 253 F.3d 1337, 1342 (11th Cir. 2001). Accordingly, a defendant may bring an ineffective assistance of counsel claim premised on the fact that his attorney's duty of loyalty was impaired by a conflict of interest.

There are two methods by which petitioner may establish such an ineffective assistance of counsel claim. Quince v. Crosby, 360 F.3d 1259, 1263 (11th Cir. 2004). First, petitioner can proceed under the traditional Strickland standard and show both that counsel's performance fell below reasonable professional standards and that petitioner was prejudiced by his attorney's substandard performance. The applicable legal principles were summarized earlier in this Opinion and Order at pp. 3-4. Second, petitioner may proceed under Cuyler v. Sullivan, 446 U.S. 335 (1980) and show that an actual conflict of interest adversely affected his counsel's performance, which excuses the need to show prejudice.

In Cuyler, the Supreme Court recognized an exception to the Strickland general rule - which requires the showing of prejudice - in situations where there is an actual conflict of interest between the attorney and his or her client which adversely affected the attorney's performance. Cuyler, 446 U.S. at 348-50; Mickens v. Taylor, 535 U.S. 162, 168-69 (2002). Under the Cuyler framework, to establish ineffective assistance of counsel petitioner must show both that (1) his counsel had an actual conflict of interest and (2) this conflict adversely affected his counsel's performance. Cuyler, 446

U.S. at 348-50; Quince, 360 F.3d at 1264; Reynolds, 253 F.3d at 1342; Pegg v. United States, 253 F.3d 1274, 1277 (11th Cir. 2001). To satisfy the "actual conflict" prong, petitioner must show something more than a possible, speculative or hypothetical conflict. Rather, petitioner must demonstrate that counsel actually had an inconsistent interest. Quince, 360 F.3d at 1264; Caderno v. United States, 256 F.3d 1213, 1218-19 (11th Cir. 2001), cert. denied, 534 U.S. 1167 (2002); Reynolds, 253 F.3d at 1342; Pegg, 253 F.3d at 1274. This requires petitioner to point to specific instances in the record to suggest an actual conflict or impairment of his interests and to demonstrate that the attorney made a choice between possible alternative courses of action. Reynolds, 253 F.3d at 1343, citing Smith v. White, 815 F.2d 1401, 1404 (11th Cir. 1987).

Assuming petitioner can show that his attorney had an actual conflict of interest, the Cuyler test also requires petitioner to show that this conflict adversely affected the representation he received. Pegg, 253 F.3d at 1277-78. To prove adverse effect, petitioner "needs to demonstrate: (a) that the defense attorney could have pursued a plausible alternative strategy, (b) that this alternative strategy was reasonable, and (c) that the alternative strategy was not followed because it conflicted with the attorney's external loyalties." Reynolds, 253 F.3d at 1343. See also Quince, 360 F.3d at 1264-65. "If there is a guilty plea involved, [the] Court looks at whether the attorney's actual conflict adversely affected the defendant's decision to plead guilty." Pegg, 253 F.3d at 1278.

B.

Freidin was indicted on June 16, 1997, on completely unrelated charges but by the same U.S. Attorney's Office which was prosecuting petitioner. This was probably an actual conflict of interest, but Freidin withdrew as counsel for petitioner on July 18, 1997, and Lida continued to represent petitioner in his previously announced capacity of lead counsel (Cr. Doc. #60). There is no showing that Freidin's brief representation of petitioner after his own indictment adversely affected the representation

petitioner received. Indeed, the court records establish that the only activity handled by Freidin during this period was a motion to modify conditions of release (Cr. Doc. #162), and Freidin prevailed on the motion (Cr. Doc. #163). The other court matters were handled by Lida alone, including two status conferences concerning the motion to dismiss and a supplemental memorandum. (Cr. Docs. #165, 168, 171). Accordingly, petitioner has not established ineffective assistance of counsel by Freidin under either the Cuyler standard or the Strickland standard.

C.

Petitioner asserts that Lida had an actual conflict of interest because he represented Freidin in Freidin's criminal case while also representing petitioner. As previously noted, the prosecution of petitioner was completely unrelated to the prosecution of Freidin, and petitioner makes no assertion to the contrary. Lida was counsel of record for Freidin for about thirty days, from June 16, 1997, through July 18, 1997, although substituted counsel Hogan actually became involved in the case on July 7, 1998. The only significant activity in Freidin's case during that time frame was an initial appearance and an arraignment. There was no inherent conflict of interest in Lida's brief simultaneous representation of both petitioner and Freidin in different criminal cases.

Petitioner asserts, however, that an actual conflict of interest existed in light of the unique procedural posture of his case at the time. Specifically, Lida had filed a motion to dismiss based upon government misconduct in connection with pretrial discovery, and Freidin had filed affidavits in support of the motion. Petitioner asserts that during his representation of Freidin, Lida advised Freidin not to provide any more affidavits in support of the motion to dismiss and not to testify at an upcoming evidentiary hearing. This advice, petitioner argues, created an actual conflict which adversely affected his interests.

(1)

On March 5, 1997, Lida filed a Motion to Dismiss

Indictment for Government Misconduct (Cr. Doc. #141) based upon government misconduct in connection with pretrial discovery. Attached to the motion were two affidavits by Freidin describing the discovery process and the misconduct being alleged against the government. (Cr. Doc. #141, Exhibits 3, 4). The motion also requested an evidentiary hearing.

At an April 16, 1997, status conference before a newly-assigned district judge, Lida gave an overview of the case's history, including the pending motion to dismiss and request for evidentiary hearing. The parties agreed to continue the matter while the parties attempted to work together on discovery. (Cr. Doc. #265). At a May 14, 1997, status conference, the district court continued the trial and set a date for the government's response to the motion to dismiss. (Cr. Doc. #159). The government's Response (Cr. Doc. #161) to the motion to dismiss was filed on May 27, 1997. The Response conceded the factual allegations that the government had removed and copied documents petitioner had set aside during the discovery process, but asserted that petitioner had suffered no prejudice from this conduct, and therefore dismissal of the Indictment was not an appropriate remedy and an evidentiary hearing was unnecessary. (Cr. Doc. #161, pp. 2-6).

At a June 17, 1997, status conference attended by Lida without Freidin, the trial court stated that she intended to hold a hearing on the motion to dismiss. Lida stated that questioning of the Assistant United States Attorney (AUSA) and case agent were paramount to the determination to be made by the court (Cr. Doc. #266, p. 6) and requested permission to subpoena or have the court subpoena the AUSA and case agent and other defense witnesses (Cr. Doc. #266, p. 7). The Court stated that the first issue would be the prejudice to petitioner, and that the former AUSA handling the case and the former case agent should be present to testify at the hearing.

An additional status conference was conducted on June 27, 1997 (Cr. Doc. #267) at which Lida, but not Freidin, appeared. Lida and the government requested a continuance of the evidentiary hearing on the motion to dismiss.

The trial court heard extensive oral argument on the motion to dismiss on July 29, 1997. (Cr. Doc. #246). The trial court suggested proceeding by affidavit, and Lida repeatedly requested an evidentiary hearing either instead of or in addition to affidavits. Lida stated that at an evidentiary hearing he would call as witnesses people from the United States Attorney's Office (Cr. Doc. #246, p. 25), the petitioner (Cr. Doc. #246, pp. 40, 56-57), and Freidin (Cr. Doc. #246, p. 58). Lida told the trial court that he would be soliciting an affidavit from Freidin as to certain issues; that he would be contacting Freidin's current attorneys about allowing Freidin to provide an affidavit and testify at an evidentiary hearing; and that Freidin was a central figure in the matters at issue. (Cr. Doc. #246, pp. 58-60). The trial court entered an Order (Cr. Doc. #172) directing the government to file affidavits in opposition to the motion to dismiss, petitioner to file affidavits in response, and then allowing petitioner an *in camera ex parte* hearing to make a proffer of prejudice caused by the alleged prosecutorial misconduct.

The government filed eight affidavits on August 19, 1997. (Cr. Doc. #178). At an October 23, 1997, status conference, Lida filed an *in camera ex parte* proffer of petitioner's position, made an *ex parte* showing of prejudice, and was allowed to file affidavits. (Cr. Doc. #188). Lida stated that Freidin would be a witness in the case, but he did not know what Freidin's attorney's position would be about allowing Freidin to testify, and suggested that concluding Freidin's criminal trial first may remove an obstacle to Freidin's testimony. (Cr. Doc. #188, pp. 16-18).

The trial court scheduled a limited evidentiary hearing concerning certain issues. (Cr. Doc. #194). In response to a defense motion for clarification, the trial court advised that if petitioner believed there was a need for witnesses other than those identified by the Court, petitioner needed to specify the witnesses he wanted to subpoena. (Cr. Doc. #198). Lida filed a Request to Subpoena the Following Witnesses (Cr. Doc. #202), which included Freidin as a witness concerning two specified areas. The trial court denied this motion (Cr. Doc. #206), finding that it had already received affidavits from many of the individuals and did not believe the presence of

the affiants were necessary, and that subpoenas for the other persons were not warranted.

The trial court conducted the limited evidentiary hearing on December 22, 1997. (Cr. Doc. #267A). In an Order (Cr. Doc. #210) filed December 24, 1997, the trial court found that the government conduct in the case was not so outrageous as to warrant dismissal and that petitioner had not shown any prejudice.

(2)

The Court concludes that the record establishes that Lida did not have an actual conflict of interest, and that even if such a conflict existed it did not adversely affect his performance on behalf of petitioner. Assuming Lida advised Freidin during his brief representation not to provide any more affidavits and not to testify at an evidentiary hearing, the record conclusively establishes that Lida faithfully represented petitioner's best interests in connection with the motion to dismiss and the disposition of the case. Prior to Freidin's indictment, the government had conceded the factual conduct of its representatives. At the status conference held during the period of joint representation (Cr. Doc. #266), Lida told the court he wanted to subpoena government personnel and other witnesses. The primary substantive arguments were held after Lida no longer represented Freidin. Lida represented to the court that Freidin would be a material witness during any evidentiary hearing, and that he would request Freidin's testimony and/or affidavit from Freidin's current lawyers. Lida also requested that the court issue a subpoena to Freidin for an evidentiary hearing. In the end, the trial court relied upon the affidavits and denied the request for a subpoena for witnesses. By the time the motion to dismiss came to a head, there was no conflict of interest, either actual or potential. Lida pursued a defense strategy which consistently requested that Freidin give testimony and/or an affidavit, and did not shrink from attempting to subpoena Freidin for any reason. There was no actual conflict of interest and no flaw identified in Lida's performance.

(3)

Under the Strickland standard, petitioner must show deficient performance and resulting prejudice. Quince, 360 F.3d at 1265. The record in this case establishes that petitioner can show neither. Lida's performance was not deficient. The affidavits submitted by Freidin were utilized by the trial court in deciding the issues; Lida repeatedly requested an evidentiary hearing in addition to the affidavits; and Lida argued the need for Freidin to testify and sought a subpoena for Freidin. There was no prejudice to petitioner. The court considered his affidavits and concluded that additional testimony was unnecessary. The court simply found against the position taken by Lida. No ineffective assistance of counsel has been demonstrated.

D.

Finally, petitioner asserts that the trial court was obliged to informed him of the conflict of interest and of his right to conflict-free counsel. While there are some situations where the court is required to take pro-active steps, e.g.. Fed. R. Crim. P. 44 (c), this is not one of them. The Court has found that there was no actual conflict of interest and no ineffective assistance under either standard. Nothing in the record suggests that the trial court had the obligation to *sua sponte* raise the issue of a potential conflict, and nothing in the record would have suggested to the trial court the need for such a hearing. The overlapping representation was brief, and Lida's conduct was not such to suggest any lingering conflict. Indeed, the contrary is shown by the record. Accordingly, this issue is without merit.

V.

Petitioner claims that his appellate attorney rendered ineffective assistance by failing to raise the conflict of interest issue on direct appeal. Petitioner asserts that he and his appellate attorney had a "vigorous dispute" concerning the issues to be raised on direct appeal, that petitioner wanted the conflict of interest raised, and that appellate counsel wrote back that after reviewing the underlying basis for the issue, including the transcripts, "I cannot agree that

a conflict existed at all." Petitioner argues that failing to raise the conflict of interest and the failure of the trial judge to inform him of his right to conflict free counsel on direct appeal was ineffective assistance of counsel. (Cv. Doc. #1, pp. 10-12).

The Court disagrees. The evidence proffered by petitioner establishes that appellate counsel did precisely what she was required to do: She consulted with her client, identified the issues he wished to pursue on appeal, reviewed the underlying documents concerning the issues, and made an independent professional judgment as to whether the issues should be raised on appeal. Appellate counsel's judgment was correct, since the issues were without arguable merit in light of the record. Appellate counsel's performance was not deficient by not including the alleged conflict of interest issues on appeal, and petitioner did not suffer any prejudice. Accordingly, this issue is without merit.

VI.

Petitioner argues that he was provided ineffective assistance by trial counsel because Lida failed to investigate or prepare for trial. While praising Freidin for conducting himself "as a professional attorney," petitioner asserts that Lida never viewed discovery compiled by petitioner and Freidin which supported a defense and failed to interview witnesses such as Dorothy Weil, April Wright, and Barbara Cook. Petitioner asserts that but for these deficiencies, he would not have plead guilty. (Cv. Docs. #1, pp. 12-19; #22, pp. 6-8).

As discussed below, the guilty plea was made freely, voluntarily, and knowingly. A review of the record establishes that Lida participated in all phases of the case, and that the guilty plea was in petitioner's best interest. Petitioner's sentencing was adversely impacted by his post-guilty plea misconduct, but that was not the result of any ineffective assistance of counsel. The facts which petitioner admitted clearly show that what he had done was not the normal way title insurance companies did business. McNabb and Weil had plead guilty and were prepared to testify against petitioner. (Cr. Doc. #282). At his sentencing hearing

petitioner stated "I'm here to tell you I know I did wrong. I accept my responsibility." (Cr. Doc. #282, p. 154). Counsel's performance was not deficient, and there was no prejudice to petitioner. This issue is therefore without merit.

VII.

Petitioner asserts that his appellate attorney provided effective assistance of counsel for failing to raise Lida's failure to investigate and prepare as an issue on direct appeal, despite being requested to do so by Petitioner. (Cv. Doc. #1, p. 22). Appellate counsel performed well within the bounds of reasonableness in deciding not to pursue this issue on appeal, despite petitioner's request that she do so. The issue lacked arguable merit in face of the record in the district court, and petitioner has not shown any prejudice. Therefore, this issue is without merit.

VIII.

Petitioner asserts that his guilty plea was not entered knowingly and intelligently, but was the result of coercion and a lack of knowledge, because he believed he could appeal pretrial rulings even after pleading guilty. Petitioner asserts he signed the Plea Agreement believing he would be able to appeal any adverse rulings on the pretrial motions. While petitioner concedes no one told him he could appeal such rulings after a guilty plea, he asserts that someone should have told him such issues would be precluded on appeal, and if he had known that he would not have plead guilty. As to the coercion, petitioner asserts that he plead guilty because both Freidin and Lida agreed he could not get a fair trial in light of the trial judge's demeanor and prior rulings, and that Lida told him he "would receive" a two level reduction for role in the offense. In his Reply, petitioner identified eight "types of coercion" which he argues caused him to plead guilty, including: Freidin's withdrawal as defense counsel, which caused a complete breakdown in his defense; Lida's failure to investigate, interview and subpoena witnesses; the magistrate judge's demeanor and resolution of numerous motions adversely to petitioner; the trial judge's demeanor and resolution of numerous motions adversely to petitioner;

Lida's advice that a plea agreement would include a three level reduction for acceptance of responsibility; the government's agreement not to oppose a two level reduction for role in the offense; the government's agreement not to oppose a sentence at the low end of the guideline range; and petitioner's belief that he could appeal all adverse pretrial rulings related to motions. (Cv. Doc. #22, p. 9). Petitioner seeks to withdraw his guilty plea. (Cv. Doc. #1, pp. 19-22).

On January 23, 1998, petitioner and Lida signed a Plea Agreement. (Cr. Doc. #213). On January 28, 1998, petitioner entered his guilty plea before the district judge. (Cr. Doc. #241). The trial court told petitioner that she would be asking a series of questions designed to make sure the guilty plea was knowing and voluntary, that it was important because he would not be allowed to withdraw his guilty plea down the road, and that he had to be very sure this is how he wanted to proceed. (Id. at 5). Petitioner was placed under oath and swore to tell the truth. (Id. at 5). Petitioner was advised of his rights pursuant to Fed. R. Crim. P. 11, and acknowledged that he would be waiving those rights by pleading guilty. (Id. at 7-8). The court conducted the plea colloquy in full compliance with Rule 11, then found that petitioner entered into the plea freely, voluntarily and knowingly. (Id. at 23). Lida requested that sentencing be consolidated with the cases of co-conspirators David McNabb and Dorothy Weil who had plead guilty in separate cases two year before. (Id. at 24-29). Lida filed a written Unopposed Motion to Consolidate Cases for Sentencing (Cr. Doc. #214), representing that McNabb and Weil had been charged "with identical charges resulting from the exact factual scenario from which defendant, Richard Hamric, was charged." The motion to consolidate was granted. (Cr. Doc. #218).

The three core concerns of Fed. R. Crim. P. 11 are that the guilty plea is free from coercion, defendant understands the nature of the charges, and defendant knows and understands the consequences of his guilty plea. United States v. Lejarde-Rada, 319 F.3d 1288, 1289 (11th Cir. 2003). Here, the record establishes a careful, detailed plea-taking proceeding and affirmatively establishes a free, voluntary, and knowing guilty plea. There is no requirement, either

in the United States Constitution or in Rule 11, that a defendant be told during a guilty plea colloquy that he may or will be unable to appeal pretrial rulings. E.g., Leiarde-Rada, 319 F.3d at 1291 (no requirement that defendant be told he may or will be unable to appeal refusal to depart downward at sentencing). None of the other matters identified by petitioner constitute coercion in any respect. The Court concludes that the record conclusively establishes that petitioner entered his guilty plea with a full understanding of its consequences and that the plea was knowing, free, and voluntary. This issue is without merit.

IX.

Petitioner argues that his appellate attorney provided ineffective assistance by failing to raise the issue of the involuntariness of his guilty plea despite his request that she do so. (Cv. Doc. #1, p. 23). As discussed above, the guilty plea was not involuntary, and any attempt to raise such an issue on direct appeal would have been frivolous. Appellate counsel provided effective assistance of counsel by not including this issue on appeal. Therefore, this issue is without merit.

Accordingly, it is now

ORDERED:

1. Petition Under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody (Cv. Doc. #1) is

DENIED.

2. The Clerk of the Court shall enter judgment accordingly and close the civil file.
3. The Clerk shall file a copy of this Order in Case No. 2:95-cr-113-FtM-29DNF.

DONE AND ORDERED at Fort Myers, Florida, this 16th day of November, 2004.

s/ JOHN E. STEELE
United States District Judge
Copies:
Counsel of Record
U.S. Probation
Richard P. Hamric

RICHARD P. HAMRIC'S PETITION
FOR
WRIT OF CERTIORARI

APPENDIX (B)
District Court's Order
December 20, 2004

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

RICHARD P. HAMRIC

Petitioner,

vs.

Case No. 2:95-cr-113-FtM-29DNF
Case No. 2:03-cv-295-FtM-29DNF

UNITED STATES OF AMERICA,

Respondent.

ORDER

This matter comes before the Court on petitioner's Request for a Certificate of Appealability (Doc. #25), filed on December 16, 2004. Pursuant to Fed. R. App. P. 22-1 (c) (1), the motion is construed as a Notice of Appeal.

Under 28 U.S.C. § 2253 (c) (1), an appeal cannot be taken from a final order in a habeas proceeding unless a certificate of appealability issues. The decision to issue a certificate of appealability requires "an overview of the claims in the habeas petition and a general assessment of their merits." Miller-El v. Cockrell, 537 U.S. 322, 336 (2003). Specifically, where a district court has rejected a prisoner's constitutional claims on the merits, the petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. See Slack v. McDaniel, 529 U.S. 473, 484 (2000); Peoples v. Haley, 227 F.3d 1342 (llth Cir. 2000). When the district court has rejected a claim on procedural grounds, the petitioner must show that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling. Slack, 529 U.S. at 484; Franklin v. Hightower, 215 F.3d 1196, 1199 (llth Cir. 2000) (per curiam), cert. denied, 121 S. Ct. 1738 (2001). "This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims."

Miller-El v. Cockrell, 537 U.S. at 336.

In this action, the Court denied the petition on the merits. (See Doc. #23). Having reviewed the arguments, the Court finds that petitioner has failed to show that jurists of reason would find the Court's assessment of the constitutional claim debatable or wrong. The certificate will be denied.

Accordingly, it is now

ORDERED:

1. Petitioner's Request for a Certificate of Appealability (Doc. #25) is **DENIED.** The Clerk shall treat the Request for a Certificate of Appealability (Doc. #25) as a Notice of Appeal and process it as such.

DONE AND ORDERED at Fort Myers, Florida, this 20th day of December, 2004.

s/ JOHN E. STEELE
United States District Judge

Copies:
USCA
Petitioner
AUSA

RICHARD P. HAMRIC'S PETITION
FOR
WRIT OF CERTIORARI

APPENDIX (C)
Court of Appeals' Order
April 27, 2005

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-10993-F

FILED
US. COURT OF APPEALS
ELEVENTH CIRCUIT
APR 27 2005
THOMAS K. KAHN
(CLERK)

RICHARD P. HAMRIC,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the Middle District of Florida

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ORDER:

Appellant's motion for a certificate of appealability is **DENIED** because appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2).

s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

RICHARD P. HAMRIC'S PETITION
FOR
WRIT OF CERTIORARI

APPENDIX (D)
Court of Appeals' Order
June 6, 2005

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 05-10993-F

FILED
US. COURT OF APPEALS
ELEVENTH CIRCUIT
JUNE 6 2005
THOMAS K. KAHN
(CLERK)

RICHARD P. HAMRIC,

Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court for the Middle District of Florida

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Before TJOFLAT and DUBINA, Circuit Judges.

BY THE COURT:

Appellant has filed a motion for reconsideration of this Court's order dated April 27,2005, denying a certificate of appealability. Upon reconsideration, appellant's motion for a certificate of appealability is DENIED because appellant has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); see also Strickland v. Washington, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed. 2d 674 (1984); Cuvler v. Sullivan. 446 U.S. 335, 348, 100 S.Ct. 1708, 1718, 64 L.Ed. 2d 333 (1980); Teiada v. Dugger. 941 F.2d 1551, 1559 (11th Cir. 1991); United States v. Rogers. 848 F.2d 166. 168(11th Cir. 1988); Gaddv v. Linahan. 780 F.2d 935.943 (11th Cir. 1986).